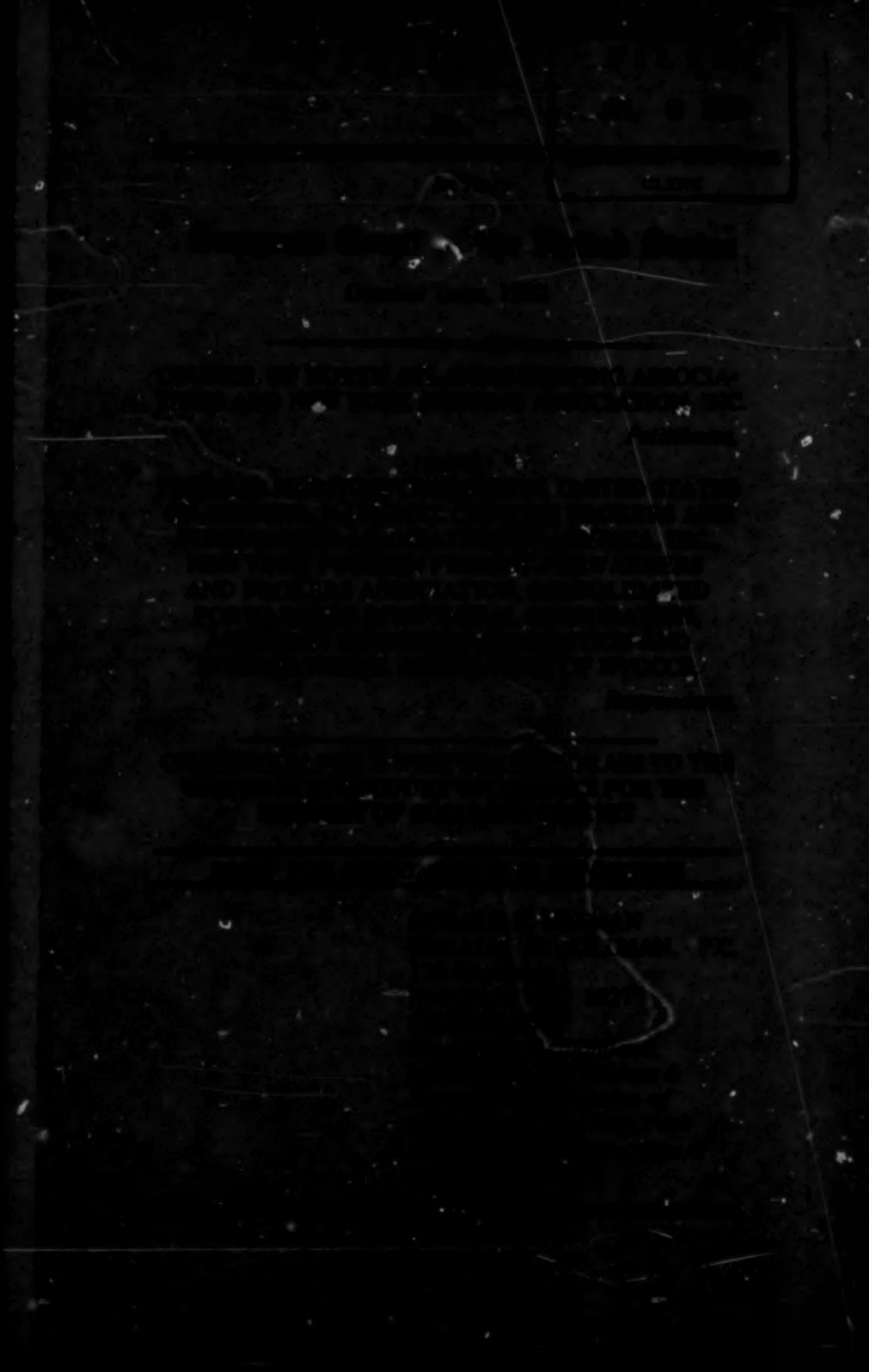

## QUESTION PRESENTED

Should the American shipping public be deprived of protection under federal shipping laws against concededly illegal practices of ocean carriers on the sole ground that such practices arise out of the provisions of a collective bargaining agreement?

## JURISDICTION

The judgment of the court of appeals (App. D at 121a-122a) was entered on March 2, 1982. The petition for certiorari was filed within 90 days thereof. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1) (1976).

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. . . . . .

---

COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS AND NEW YORK SHIPPING ASSOCIATION, INC.,

Petitioners,

v.

FEDERAL MARITIME COMMISSION, UNITED STATES OF AMERICA, NATIONAL CUSTOMS BROKERS AND FORWARDERS ASSOCIATION OF AMERICA, INC., NEW YORK FOREIGN FREIGHT FORWARDERS AND BROKERS ASSOCIATION, CONSOLIDATED FORWARDERS INTERMODAL CORPORATION, AMERICAN IMPORTERS ASSOCIATION AND INTERNATIONAL ASSOCIATION OF NVOCCS,

Respondents

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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# BRIEF FOR RESPONDENTS IN OPPOSITION

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## OPINIONS BELOW

The opinion of the court of appeals is reported officially at 672 F. 2d 171. A copy is reproduced as Appendix A in the separately bound appendix to this petition. (App. A at 1a-47a). The decision of the Federal Maritime Commission ("FMC" or "Commission") appears officially at 21 F. M. C. 1 (1978) and a copy is reproduced in the separately bound appendix. (App. B at 48a-60a). The Initial Decision of the FMC's administrative law judge (App. C at 61a-120a) appears officially at 21 F.M. C. 7 (1975).

## STATUTES

The Maritime Labor Agreements Act ("MLAA"), Pub. L. No. 96-325, 94 Stat. 1021(Aug. 8, 1980), which petitioners contend is relevant to the petition

herein was not a factor in the decision below. Indeed, the court of appeals unequivocally stated that the MLAA "has no bearing on the FMC's jurisdiction over the Rules on Containers in Dockets Nos. 73-17 and 74-40" (App. A at 26a), because the law was intended to have only prospective application and did not affect Commission proceedings, such as the dockets herein, commenced prior to the date of its enactment. While petitioners are correct in stating that the court of appeals addressed the MLAA (Pet. p. 9, fn. 15), it did so only to dispose of petitioners' misplaced reliance upon it. There is no support for petitioners' assertion that the court of appeals' denial of the non-statutory exemption was "influenced by its

interpretation of the MLAA". (Pet. p. 9, fn. 15).

Similarly unsupported is petitioners' contention that the Labor Management Relations Act ("LMRA"), §§8(b)(4) and 8(e), 29 U. S. C. §158(b)(4) and 158(e) (1976) is involved in this petition. The court of appeals did not address the LMRA further than to point out that "(t)he NLRB's interpretation of Sections 8(b)(4) and 8(e) does not answer the questions the FMC is required to ask - do the Rules unduly discriminate against certain shippers, and are they unjust and unreasonable?" (App. A at 21a-22a).

## STATEMENT OF THE CASE

To the extent necessary to frame the legal questions involved, the facts appear in the Initial Decision of the

FMC's administrative law judge (App. C at 61a-120a), the Final Report and Order of the FMC (App. B, at 48a-60a) and the opinion of the court of appeals.(App. A at 1a-47a).

This case arises out of the inclusion in a steamship carrier's tariff of the 1974 Rules on Containers ("Rules"). The Rules constitute the response of the International Longshoremen's Association ("ILA") to what it perceived as the displacement of ILA labor occasioned by the advent of "containerization" in U. S. ocean-borne foreign commerce. The background and history of the development of container technology and the aggressive response of the ILA thereto is amply set forth in the opinion of the court of appeals. (App. A at 4a-11a).

The advantages of containerized transportation to the American shipper were well documented in the record before the FMC and were referred to and considered by the court of appeals in rendering its decision.(App. A at 5a-7a, fns.10-20).

Briefly, the benefits of containerization to American commerce include shorter delivery times, a single bill of lading, reduced export packaging costs, and reduced risk of loss, damage and pilferage at dockside.(App.A at 7a, fns.17-19). Simply put, containerization represented a quantum leap in efficiency in U.S. import and export trade over the traditional "breakbulk" method of transportation.

While the Rules have been termed a compromise between the steamship and stevedoring companies represented by petitioners on the one hand and maritime workers represented by the ILA on the other, the Rules as incorporated into the steamship carrier tariffs impose burdens on other persons who were not parties to the negotiation of the Rules. Specifically affected, although without voice in the formulation of the Rules, were importers, exporters, consolidators, forwarders, distributors and others processing shipments within the arbitrary 50-mile radius of a covered port. (App. A at 13a and 38a). The Rules require that all containers originating from or destined for points within the 50-mile zone be unloaded

("stripped") and repacked ("stuffed") into a different container at the pier by ILA labor unless one of three exceptions applies. (App. A at 11a-12a). First, a container is allowed free movement across the pier if the contents are owned by a single beneficial owner and are loaded or unloaded by the owner's own employees at its own facility. Unobstructed movement across the pier of an import container is also permitted where the contents are stored at a public warehouse at regular rates for 30 days prior to distribution. Third, containers of mail, household goods of persons changing residences and personal effects of military personnel may move freely regardless of their point of origin or destination.

The burdens imposed by the Rules fall squarely on the shoulders of the small shipper, consolidator or consignee. He is prevented from taking full advantage of the benefits of containerization because of the increased costs of stripping and repacking an already loaded container. (App. A at 13a-14a, App. C at 95a-99a).

The enforcement provisions of the Rules also mandate the blacklisting of the non-vessel operating common carriers ("NVOCC") and consolidators by forbidding carriers or their direct employees to supply containers to them. (App. I at 331a).

The FMC, whose primary responsibility is the protection of American shippers under the Shipping Act, 1916

and the Intercoastal Shipping Act, 1933, (See court of appeals decision, J. McKenna, concurring in part and dissenting in part, App. A. p. 45a) from unequal and discriminatory treatment by carriers, initiated an investigation into the discriminatory effect of the Sea-Land and later the PRMSA tariff, which incorporated the Rules verbatim.

## DECISIONS BELOW

The Initial Decision of the ALJ, subsequently adopted by the Commission, held that the Commission had jurisdiction to review the PRMSA tariff provisions and found the tariff provisions to be in violation of sections 14 Fourth, 16 First and 18(a) of the Shipping Act, 1916 and of section 4 of the Intercoastal Shipping Act, 1933. Contrary to the bald

assertions made by petitioners (Pet. at 8), the Commission's reasons for its decision are not at all unclear, nor did the Commission "misread" this Court's earlier decisions. The ALJ based his determination on "the fundamental truth that the FMC has jurisdiction over tariffs . . . " (App. C at 107a). Similarly, the Commission pointed out that,unlike the agreements subject to preimplementation filing and approval under §15 of the Shipping Act, 1916 at issue in FMC v. Pacific Maritime Association ("PMA") 435 U. S. 40 (1978) and Volkswagenwerk Aktiengesellschaft v. FMC ("Volkswagen"), 390 U. S. 261 (1968), there was "no such agreement at issue here. What we have here is merely the unilateral implementation of a rule

founded in a collective bargaining agreement." (App. B at 59a).

The court of appeals took the identical approach. It was acutely aware and reiterated numerous times that what it had before it for review were "tariff provisions incorporating the Rules on Containers." (emphasis added) (App. A at 14a, 15a, 18a, 19a, 21a, 28a, 35a, n. 125, 37a).

## ARGUMENT

### I

### THERE ARE NO SUBSTANTIAL QUESTIONS OF FEDERAL IMPORTANCE TO BE CONSIDERED

There is no support for petitioners' assertion (Pet. at 10) that the District of Columbia Circuit was presented with "intertwined federal labor, antitrust and shipping questions." Nor can it be

accurately stated that the court of appeals found the question before it any more "substantial and significant" (Pet. at 10) than other matters which regularly come on to be heard by the court.

There was nothing intertwined about the decision. The court of appeals merely employed the established standards of United Stevedoring Corp. v. Boston Shipping Association, ("Boston Shipping") 16 FMC 7 (1962) to hold that the FMC had jurisdiction to review the terms of a carrier's tariff, notwithstanding the petitioners' claims of a blanket labor exemption. The Boston Shipping standards were adopted by this Court in PMA wherein it was held

that there is no categorical exemption from the shipping laws for anti-competitive collective bargaining contracts.

Furthermore, it is a gross overstatement to say that the decision below has "nationwide ramifications". There is no evidence in the record that any union other than the ILA has adopted similar rules. Rather, the decision resolves a specific issue - whether steamship lines, coerced by an agressive union to adopt rules labelled "work preservation" (in reality, the rules would be better termed "work acquisition") should enjoy a blanket exemption from the proscriptions of our federal shipping laws, notwithstanding

the well documented (and uncontested[1]) disastrous effect of the Rules on the American shipping public. (App.A at 37a-38a).

The court of appeals made clear that its decision was limited to the labor exemption from the shipping laws and did not affect the labor exemption in the antitrust context. It drew a careful distinction between the two, stating that "even if the Rules are exempt from antitrust scrutiny...they might not be exempt from the shipping laws and vice versa." (App. A at 38a, fn.136).

[1]Petitioners asserted before the court of appeals that they held "in reserve" their challenge to the FMC's finding that the tariff rules violated the substantive portions of the shipping laws. Petitioners have no option to hold any argument in reserve on an appeal. Having failed to raise the substantive finding, petitioners have, in effect, conceded that the FMC's finding was correct.

Petitioners' characterization of the issues presented as being somehow "intertwined" and the assertion that the decision below has ramifications beyond the shipping law is merely an attempt to cloud the purely shipping law questions presented and to accrete to the petition greater significance than it truly possesses.

## II.

## THERE IS NO "RECURRING UNCERTAINTY" CONCERNING THE LABOR EXEMPTION

Petitioners' claim that the court of appeals somehow "included in the labor exemption equation ... (a) factor which would automatically remove the exemption because of the effects of the labor contract upon third parties" (Pet. at 12-13) is simply wrong.

The court considered in detail each of the four criteria advanced in Boston Shipping and adopted in PMA. Rather than seize upon any one of the criteria as dispositive of the exemption issue, the court proceeded to analyze the Rules in light of all four Boston Shipping guidelines (App. A at 36a,fn.127) before concluding that although the Rules satisfied the first three, they failed to satisfy the fourth. It recognized that "(a)lthough none of the criteria is 'determinative', consideration of each factor facilitates the balancing of an agreement's effect on the business market against the impact on collective bargaining." (App. A at 36a).

Thus, far from adopting a "pure effects test" and thereby abdicating its judicial responsibility to balance the sometimes competing policies of federal labor law and shipping law (Pet. at 13), the court undertook the reasoned and balanced analysis called for by Boston Shipping and PMA.

Ironically, the true proponents of judicial abdication have always been petitioners. Their contention throughout has been that "the FMC completely lacks jurisdiction over the PRMSA tariff provisions in question because they are work preservation rules derived directly from a collective bargaining agreement". (App. A at 18a). The petitioners' categorical imperative, however, was soundly rejected by this court in PMA

precisely because the claim of total immunity contravened the clear and specific grant of authority bestowed on the FMC by Congress to protect American shippers from discriminatory treatment. It is surely the height of absurdity for petitioners to criticize the court of appeals for failing to reconcile competing statutory directives when petitioners have themselves invariably asserted a meat-axe approach of total immunity.

Petitioners sound a disturbing note when they assert that the ILA has "voiced its indignation" (Pet. at 10, n. 17) over what it perceives as the FMC's "intrusion" into its domain. It is not correct to say that an affirmance of the decision below will render

disputes over job security insoluble. The parties to the collective bargaining agreement always have the option to reach an understanding on the issue, but what is required, at a minimum, is that the solution adopted must not violate shipping laws intended by Congress to protect those engaged in our import-export trade.

Steamship lines and the ILA are not the only entities subject to multiple federal regulation. If the carriers and the union disapprove of this "unduly onerous regime" (Pet. at 14) of federal regulation, their recourse should be to the legislative branch. The veiled threat in the petition that the union will strike to undo a judicial decision forcefully highlights the urgent need,

deeply felt in PMA, Boston Shipping, and the decision below, to guarantee the FMC's continued jurisdiction over carrier practices destructive to vital segments of our ocean commerce.

III

THERE IS NO INTER-CIRCUIT CONFLICT

The two cases cited by petitioners, Intercontinental Container Transport Corp. v. New York Shipping Association ("ICTC"), 426 F. 2d 884 (2d Cir. 1970) and Consolidated Express, Inc. v. New York Shipping Association, ("Conex"), 602 F. 2d 494(3d Cir. 1979), vacated and remanded, 448 U. S. 901 (1980), both dealt with the labor exemption from the antitrust laws. This Court pointed out in PMA that:

"because the ultimate issue in

> cases such as this is the accommodation of the Shipping Act and the labor laws, rather than the labor laws and the anti-trust laws ... the exemption for collective-bargaining contracts from Shipping Act requirements is not always exactly congruent with the so-called labor exemption from the antitrust laws as understood by the courts." PMA 435 U.S. at 63.

The court of appeals was fully aware of the Second Circuit's decision in ICTC but distinguished the case from the present proceeding under the shipping laws. (App. A at 38a-39a, n. 136). For the same reasons, while the issue in Conex bears some resemblance to those at issue here, the findings in Conex are not dispositive of the shipping law questions raised in this proceeding. The court of appeals, therefore, correctly invoked this Court's

directives in PMA.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
June 30, 1982

Respectfully submitted,

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